

FINAL



Town of Southern Shores

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Planning Board Meeting

December 19, 2016

5:30 p.m., Pitts Center

MEETING MINUTES

I. CALL TO ORDER:

Chairperson Sam Williams called the meeting to order at 5:30 pm. Planning Board Members Gray Berryman, Elizabeth Morey, Sam Williams, Joe McGraw, Jay Russell, Town Planner Wes Haskett, Town Clerk Sheila Kane, Board Attorney Jay Wheless, and Town Attorney Ben Gallop were present.

II. PLEDGE OF ALLEGIANCE:

Chairperson Sam Williams led the Pledge of Allegiance.

III. APPROVAL OF AGENDA:

Jay Russell motioned to approve the agenda. Gray Berryman seconded the motion. The motion passed unanimously (5-0).

IV. APPROVAL OF MINUTES:

Joe McGraw motioned to approve the minutes of the November 21, 2016 Planning Board Meeting as amended. Jay Russell seconded the motion. The motion passed unanimously (5-0).

V. PUBLIC COMMENT:

John Finelli-Martins Point-wished everyone Merry Christmas and Happy Holidays.

VI. OLD BUSINESS:

None

VII. NEW BUSINESS:

- A. APA-16-02: Appeal application submitted by Akers Family, LLC to appeal the Zoning Administrator's decision to decline to render a Formal Interpretation regarding proposed development at 193 N. Dogwood Trl.

Chairman Williams announced that the Planning Board was now acting as the Town of Southern Shores Board of Adjustment.

DETERMINATION OF CONFLICT OF INTEREST

Chairperson Williams introduced the application. He then presented those items that would cause a conflict of interest. He asked each member of the Board if they had any conflict of interest as it related to the appeal application. Board members identified no conflict of interests.

BACKGROUND

Chairperson Williams presented a brief background on the actions that lead to the submission of the appeal application and the Town's motion to dismiss. He also indicated that before the Board could rule on the appeal the Board must decide if the Board had jurisdiction over the appeal.

SWEARING IN OF ALL PEOPLE GIVING TESTIMONY

Chairperson Williams asked that all persons expecting to give testimony to be sworn in. Board Attorney Wheless asked Town Attorney Gallop and Applicant Attorney Gray if they will be giving testimony therefore requiring to be sworn in or will this be arguments only. Attorney Gallop replied that other than dates, which are in the record, it will be arguments only.

OPEN HEARING & EVIDENTIARY PORTION OF HEARING

Chairperson Williams opened the hearing and indicated that this part of the hearing would focus on the motion to dismiss the appeal. He then asked Town Planner, Mr. Wes Haskett to present the staff report. Mr. Haskett presented the staff report (attached).

Attorney Gallop stated that the motion to dismiss packet contained a request from Mr. Gray, on behalf of the Ackers family, for Mr. Haskett to issue a formal interpretation and Mr. Haskett's September 12, 2016 email to Mr. Gray declining to issue a formal interpretation by exercising his right of discretion not to issue a decision. Also, the appeal application was hand delivered on October 14, 2016 to the Town along with a cover letter from Mr. Gray recognizing it was a couple days later than the appeal deadline. Attorney Gallop stated the issue that is before the Board on this motion is whether or not the September 12, 2016 email issued by Mr. Haskett was an appealable formal interpretation of the Town code by NC law. Attorney Gallop stated that it was not for two reasons. First, it is not an appealable decision and second it wasn't timely. Both of these have been determined by the courts to be subject matter jurisdiction.

Attorney Gallop stated the Board of Adjustment has subject matter jurisdiction which is driven by NCGS 168.388 generally relating to variances, appeals, and conditional use permits, as well as some other things that are directed by ordinance. Subject matter jurisdiction cannot be waived. Attorney Gallop said that the ordinance was specifically drafted to avoid a situation such as this. He stated the ordinance follows the statute.

Attorney Gallop said that the only formal interpretations of the zoning ordinance that are appealable are those the Town Manager approves. Had Mr. Haskett chosen to exercise his discretion and issued a formal interpretation, Mr. Haskett would have had to have the Town Manager's approval, which he did not. The response must also state on its face in quotes "This is a formal zoning ordinance interpretation" and must also provide evidence that it was served upon the Town Manager. Attorney Gallop stated Mr. Haskett's response to Mr. Gray did not meet any of the requirements of a formal zoning ordinance interpretation including no specific certificate of service being sent to the Town Manager. He stated Mr. Haskett clearly said he was not answering the question, he was not providing a formal interpretation, and he was exercising his discretion under the code not to do it. Attorney Gallop followed up by telling the Board therefore there is no decision here for them to make and that is why there is no subject matter jurisdiction.

Attorney Gallop also stated he would like to address the timing issue in case the Board did vote in favor of subject matter jurisdiction with regard to the formal interpretation itself. He stated the law is very clear in cases of Boards of Adjustment because they are created by statute and statutory requirements must be met. The timeliness requirements

of the code and the statute must be met. Mr. Haskett's letter was emailed on September 12, 2016, the applicant had thirty days to file an appeal (which was due October 12, 2016-close of business) and the applicant's attorney hand delivered an appeal on October 14, 2016.

Board Attorney Wheless asked Attorney Gallop if the Board agrees and grants the motion to dismiss is there some course of action that the applicant can take to seek some relief. Town Attorney Gallop stated not for the formal interpretation but they may be able to make some changes and seek another permit.

Applicant Attorney Gray stated what Attorney Gallop presented was true and it is the law but what he does have a disagreement on is whether in fact there was an interpretation or not. Mr. Gray referenced the email sent to him by Mr. Haskett on September 12, 2016. He stated had Mr. Haskett just said he exercised his discretion not to give a formal interpretation, he would have not filed the appeal. Since Mr. Haskett's continued language goes on to state the permit was denied, that is in fact the reason for his decision and that is appealable. It is a binding decision based on what he said. Attorney Gray stated he is not disagreeing with the law just whether or not an interpretation was made.

Attorney Gray stated he acknowledges the second part and they did submit the appeal on October 14, 2016 and that was due to the weather. He stated there are provisions in the law, even with the strict 30 days, that under extraordinary circumstances an applicant can obtain extensions. A hurricane is an extraordinary circumstance. He respectfully asked the Board to determine that it had subject matter jurisdiction.

Attorney Gallop stated Mr. Haskett did not interpret the zoning code for Attorney Gray or his client. Mr. Haskett determined that he did not want to exercise his discretion. Simply referencing the prior permit was not a decision to formally interpret the zoning code. Mr. Gallop also stated his research has determined that time extensions do not apply to subject matter jurisdiction questions.

Attorney Gray stated Mr. Haskett referenced and attached a copy of the denial letter, which is in fact his decision and as such he believes the Board has subject matter jurisdiction.

Chairperson Williams stated to Attorney Gray that it was his understanding that there are several things that have to go into a formal interpretation, such as specified formats and notifications. Attorney Gray stated yes they are supposed to be in there per the Town's ordinance. He stated that the Town Manager Peter Rascoe was copied in the email so essentially the only part missing is the heading on top. He stated that Mr. Haskett was not going to render an opinion but in fact goes on and renders an opinion. Whether he meant to do it that way is immaterial from the issue of does it grant you subject matter jurisdiction and the answer is yes.

Chairperson Williams stated that Attorney Gallop made it very clear in his mind that there were certain administrative things in the appeal that were not done. He understood that there was no flexibility in the process. He asked if it still permitted the Board to have jurisdiction over this. Attorney Gray responded yes and gave an analogy that went: if Attorney Gray requested an interpretation by formal letter; Mr. Haskett responds with a formal letter, and Attorney Gray goes through all the steps and procedures but does not put a formal heading on the letter he has a formal interpretation of X" whatever "X" is. If it doesn't have the "magic heading"; does the Board still not have subject matter

jurisdiction. It is an interpretation and it is binding. If the Board does not have subject matter jurisdiction for this, then where does the applicant go.

Chairperson Williams brought up the time limits issue and that Attorney Gray was two days late. He stated Mr. Gray's presentation made a statement that it was ok and asked him to clarify his reasoning. Attorney Gray acknowledged it was two days beyond the 30-day time limit. He indicated that there is case law that basically says in extraordinary circumstances, such as hurricanes, you can get additional time. He admitted he cannot find a case for Boards of Adjustment that allowed it but he can find it in other areas.

Board Member Gray Berryman pointed out to Attorney Gray that he said that the email received on September 12, 2016 was indeed an interpretation but on the appeal it says there was not an interpretation. Board Member Berryman asked which one is it? Is Mr. Haskett's email, because he added the extra language, the interpretation or is what it says on number 6 of the application that it didn't render an interpretation? Attorney Gray stated that he did not know how to answer the question on the application. It indicated that there was not a formal interpretation given but in his personal opinion there was. He concurred that it was confusing.

Chairperson Williams stated that Attorney Gray asked where do I go from here and asked Mr. Gray can't you go to superior court? Mr. Gray responded that he is required to exhaust all administrative remedies prior to going to superior court. One of those remedies is in fact to see if the Board has subject matter jurisdiction and if they do, to then present the evidence so the court can then in fact view that evidence. If in fact the Board decides that it has no subject matter jurisdiction, then yes we have a right to go to superior court and present evidence there. In an attempt to confirm what he heard, Chairperson Williams restated what he heard and that was that if all administrative efforts are exhausted then it can be taken to superior court, to which Attorney Gray replied that the possibility is there, yes.

Town Attorney Gallop stated he wanted to make two points based on Chairperson Williams questions. He stated there are reasons for the formal requirements. If you don't follow those formal requirements, then you nullify the language in the ordinance that says a response or a request is not a formal interpretation unless it is in writing and contains that notation that this is a formal zoning interpretation. You also nullify the language that says any written or oral interpretations that do not meet the strict requirements of this subsection are merely advisory and represent only the view, the opinion of the administrative official issuing it, not the Town's decision. Advisory interpretations have no binding force or effect and there is no right to appeal advisory interpretations to the Board. It defines how you have a non-advisory interpretation.

Town Attorney Gallop stated the second point was on the comment "where do you go from here." The decision that was made was to exercise discretion, not to interpret the zoning ordinance. Even if you back track you are going to send it back to Mr. Haskett and he is going to exercise his discretion as he has ultimate discretion in the ordinance. The decision here that Mr. Haskett made was not on the zoning ordinance, it was a decision of whether or not to exercise discretion and he chose to exercise his discretion and thus there is no appealable decision.

DELIBERATION AND DECISION

Board Attorney Wheless stated that to be certain that an adequate record has been created he listed the following:

- Before the Board is the motion to dismiss filed by the Town along with certificates of service

- A transmittal letter, staff report dated December 12, 2016
- Mr. Gray's letter of October 14, 2016, along with his attached notice of appeal
- Mr. Haskett's September 12, 2016 email with attachment of the email from February 24, 2016 zoning permit denial letter
- September 7, 2016 request by Mr. Gray for the Ackers family requesting a formal opinion.

Board Attorney Wheless asked Chairperson Williams if he accepted these as being the documentary evidence for this hearing to which Mr. Williams replied yes.

Chairperson Williams called on the Board for questions or comments.

Board Member Elizabeth Morey questioned why the applicant did not request a Board of Adjustment hearing on the permit back in February. She stated she did not believe this question was germane to the discussion tonight.

Board Members Berryman, McGraw and Russell all stated they would like to hear Board Attorney Wheless' s thoughts.

Chairperson Williams stated it was clear in his mind that the applicant had not made a case for the Board having jurisdiction to hear the appeal. He continued to state that he believed the September 12, 2016 email from Mr. Haskett was not a decision or interpretation. In addition, he said the fact is the appeal was late. He also stated that there is no case law which specifically states Boards of Adjustment have flexibility with the timing issue. It is his opinion that the Board does not have jurisdiction over this matter.

Board Attorney Wheless stated Town Code 36-366 outlines in plain English what it takes to have a formal interpretation; it takes A, B, C and D. Those are the elements, nothing more and nothing less. NCGS § 160A-388 tells one how to handle appeals and what can be appealed and the language is generally relative to a final decision of some sort. The Town ordinance tells how one gains a formal interpretation. The email may give an interpretation but it is not a formal interpretation according to the Town's ordinance. The ordinance was designed with these three or four elements in mind so that there could be no misunderstanding of what was intended when the Town's Planner authored a letter or even an opinion by reference. If it contains these elements the Town has accepted this as their final interpretation.

VOTE: Chairperson Williams asked each Board member if they believe the Board had jurisdiction to hear the appeal. The Board unanimously voted no indicating the Board did not have jurisdiction to hear the appeal (5-0).

Board Attorney Wheless recommended the Board make a motion and not just a vote.

MOTION: Gray Berryman moved to grant the Town the motion to dismiss based on the fact that a formal interpretation was not given. The motion was seconded by Joe McGraw.

MOTION: Chairperson Williams moved to amend the original motion to add the timeliness factor (motion granted due to lateness of appeal). The motion to amend was seconded by Elizabeth Morey. The motion to amend passed unanimously (5-0).

MOTION: Chairperson Williams called for a vote on the original motion as amended. The vote passed unanimously (5-0).

Chairperson Williams closed the hearing and continued on the Planning Board's meeting agenda.

B. 2017 Planning Board Meeting Schedule

Chairman Williams asked for a motion to approve the Planning Board's 2017 meeting schedule.

MOTION: Jay Russell moved to approve the 2017 Planning Board meeting schedule. The motion was seconded by Joe McGraw. The motion passed unanimously (5-0).

PUBLIC COMMENT

Chairperson Williams opened public comment and the following citizens spoke:

- Mr. Dave Shrader-273 N Dogwood Trail (commented on the Board's action re: the appeal action).
- Mr. Ozzy Gray Trail (commented on the Board's action re: the appeal action).
- Mr. Joe Van Gieson-228 N Dogwood Trail (commented on side yard setbacks for 50 foot wide lots).

Chairperson Williams closed the public comment period. He stated that he does not normally respond to public comments during the meeting but he would this time.

Chairperson Williams stated that with respect to possible variance requests and the number of 50 ft. wide lots in Town, he has spoken to the Town Planner about the possible need in the Town's ordinance for language that grants a lesser side yard setback for lots that are 50 ft. wide. This would prevent variance requests for side yard setbacks on 50 foot wide lots having to come before the Board. This would only be for the 50 ft. wide lots that were grandfathered into the system, i.e., platted before Southern Shores became a town.

Chairperson Williams also stated that tonight's Board of Adjustment decision was not on a variance to raise the floor or anything like that (i.e., permit request application items) but was to be a decision on the appeal that was made, i.e., whether the Board granted that appeal or not. That action was moved back because the Town filed a motion to dismiss (the appeal). The appeal was not on the building permit but on a request for a ruling on a formal interpretation.

PLANNING BOARD MEMBER COMMENTS:

Jay Russell stated that garage elevation has come up before the Board of Adjustment back in 2001.

ANNOUNCEMENTS: Chairperson Williams announced that the next Planning Board meeting is on Wednesday, January 18, 2017.

ADJOURNMENT:

Chairman Williams asked for a motion to adjourn.

MOTION: Joe McGraw motioned to adjourn. Jay Russell seconded the motion. The motion passed unanimously and the meeting adjourned at 6:40 p.m.

ATTEST:

RESPECTFULLY SUBMITTED:


Sam Williams, Chairperson


Sheila Kane, Town Clerk



STAFF REPORT

To: Southern Shores Planning Board
Date: December 12, 2016
Case: APA-16-02
Prepared By: Wes Haskett, Town Planner/Code Enforcement Officer

GENERAL INFORMATION

Applicant: Akers Family, LLC
193 N. Dogwood Trl.
Southern Shores, NC 27949

Requested Action: Appeal of the Zoning Administrator's decision to decline to render a Formal Interpretation regarding proposed development at 193 N. Dogwood Trl.

PIN #: 986817114576
Zoning: RS-1, Single-Family Residential District

Existing Land Use: "Residential"

Surrounding Land Use & Zoning:

North- Residential; RS-1, Single-Family Residential District
South- Residential; RS-1, Single-Family Residential District
East- Residential; RS-1, Single-Family Residential District
West- Ginguite Creek Extraterritorial Ocean and Sound Water District

Physical Characteristics: Developed (Single-family Dwelling)

Applicable Regulations: Chapter 36, Zoning Ordinance: Article III, Interpretation and Definition of Terms; Article V, Nonconformities; Article VII, Schedule of District Regulations; Article XII, Board of Adjustment.

ANALYSIS

The applicant is requesting an appeal of the Zoning Administrator's decision to decline to render a Formal Interpretation regarding proposed development at 193 N. Dogwood Trl. Article XII states that any person may request a formal interpretation of any provision of the Zoning Ordinance. Such request must relate to a specific parcel of property, must be made in writing, must state all of the necessary facts to make the determination and must specifically state the ordinance provisions subject to the interpretation request. Only the Director of the Town's Planning and Zoning Department (Zoning Administrator) is authorized to issue a formal interpretation. The Director may in his/her discretion decide whether or not to respond to a request for a formal interpretation.

Article XII also states that the Board of Adjustment shall hear and decide appeals of administrative decisions of administrative officials charged with enforcement of the Zoning Ordinance and delineates when a formal interpretation has been issued and is appealable. The owner has 30 days from receipt of the written notice within which to file an appeal.